IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE CRIMINAL JURISDICTION

CRIMINAL APPLICATION NO.4297 OF 2005
IN
CRIMINAL APPEAL NO.389 OF 2002

Uday Mohanlal Acharya .. Applicant

v/s.

The State of Maharashtra .. Respondent
(through G.B., C.B., C.I.D.
(Economic Cell), Mumbai.

And

Siddhanath Ragunath Nikam .. Applicant
(Intervenor)

Mr.Nitin Pradhan with Ms.S.D.Khot for the applicant.

Mr.S.R. Borulkar, Public Prosecutor with Mr.D.S.Mhaispurkar, Addl.Public Prosecutor for the State.

Mr.R.V.Govilkar with Mr.D.V.Sutar and Mr.M.B.Gawade for the applicant-intervenor.

CORAM : SMT.RANJANA DESAI, J.

DATED : 18th October, 2005.

P.C.

By his judgment and order dated 5.4.2002, passed in Special Case No.36 of 2000, the Special Judge, Greater Bombay convicted the applicant under section 3 of the Maharashtra Protection of Interest of Depositors (In Financial Establishment) Act, 1999 (For short "The MPID Act"). The applicant who is the proprietor of C.U.Marketing (For short "CUM") is convicted for having fraudulently defaulted in repayment of deposits

collected from the investors during the period 30.4.1999 to 29.4.2000 alongwith the benefits in the form of interest, bonus, double money and many other assurances against the said depositors to the said investors aggregating to Rs.35,87,00,799/-. The Special Judge sentenced the applicant for six years. A fine of Rs.1,00,000/- was imposed on him. In default of payment of fine, the applicant was to undergo further R.I. for six months.

2. The applicant challenged the said judgment and order in Criminal Appeal No.389 of 2002. On 29.4.2002, I admitted the appeal. By a detailed order of the same date, I rejected the prayer for bail. This is the applicant's second bail application.

3. I have heard Mr. Pradhan, the learned counsel appearing for the applicant at great length. He submitted that the applicant is in jail for 4 years and 3 months. He has undergone 3/4th of the sentence awarded to him. The appeal is not likely to be heard in the near future. Hence, the applicant be released on bail. In support of his submission, the learned counsel relied upon Bhagwan Rama Shinde Gosai & ors. v. State of Gujarat, (1999)4 SCC 421 and Shailendra Kumar v. State of Delhi, (2000)4 SCC 178. Mr.Pradhan further pointed out that after the applicant filed the instant bail

application, the Full Bench of this court by its judgment and order dated 5th September, 2005 has struck down the MPID Act as being ultra vires. The learned counsel submitted that this is a material change in the circumstances and that would also entitle the applicant to an order of bail.

4. Mr.Borulkar, the learned Public Prosecutor submitted that though MPID Act has been struck down by the Full Bench of this court as being ultra vires, the Full Bench has directed that no action will be taken in pursuance of the said judgement for a period of 12 weeks. The learned Public Prosecutor urged that 12 weeks period has not yet expired. He further submitted that the State has challenged this court's judgment declaring MPID Act ultra vires in the Supreme Court. The learned Public Prosecutor urged that therefore, the hearing of the bail application may be deferred.

5. I have also heard Mr.Govilkar, the learned counsel appearing for the intervenor. Mr.Govilkar submitted that the applicant has defrauded about 29107 investors. This is a serious case and since the prayer for bail is once rejected by this court, the present application should not be entertained. Mr.Govilkar contended that the judgments cited by Mr.Pradhan have no application to the facts of the present case. He submitted that the decision of a

court should not be read as a statute. It is an authority for the question of law determined by it. Such a question is determined having regard to the fact situation obtaining therein. While applying the ratio, the court may not pick out a word or a sentence from the judgment divorced from the context in which the said question arose for consideration. A judgment must be read in its entirety and the observations made therein should receive consideration in the light of the questions raised before it. Mr.Govilkar contended that in this connection, reference may be made to Punjab National Bank v. R.L.Vaid & ors., 2004(7) SCC 698. He also contended that it is well settled that a decision is not an authority for a proposition which did not fall for its consideration and a point not raised before a court would not be an authority on the said question. In this connection, he relied on A-One Granites v. State of U.P. & ors., 2001(3) SCC 537. Mr.Govilkar urged that if the judgments cited by Mr.Pradhan are read in the light of the above observations of the Supreme Court, it must be held that they are not applicable to the facts of the present case.

6. Mr.Govilkar then drew my attention to paragraph 21 of the judgment of this court dated 29.4.2002 whereby the applicant's first bail application was rejected. He pointed out that the appeal was

expedited and this court had observed that if the applicant prepares paper-book and moves the court for expeditious hearing surely any court would take it up for early hearing for it involves 29107 investors and the liability of the appellant is Rs.3,58,70,07,999/-. He pointed out that this court had recorded the statement of the Additional Advocate General that he was ready for an immediate hearing. Mr.Govilkar submitted that the applicant ought to have prepared the paper-book and moved this court for an early hearing in view of the above observations of this court. The applicant has not done so. He, therefore, cannot urge now that he should be released on bail because he is in jail for 4 years and 3 months. Mr.Govilkar submitted that merely because the convicted person files an appeal in challenge of the conviction, the court should not suspend the operation of the order of conviction. The court has a duty to look at all aspects including the ramifications of keeping such conviction in abeyance. For this proposition, he relied upon State of Maharashtra v. Gajanan and anr., 2004 Cri.L.J. 919. He further submitted that the order directing suspension of sentence and grant of bail should not be passed as a matter of routine. In support of this submission, he relied on State of Haryana v. Hasmat, 2004 Cri.L.J.3840. The learned counsel, therefore, submitted that the prayer for bail may be rejected.

7. It is true that though this court in its order dated 29th April, 2002 had observed that the applicant should move the court for early hearing, the applicant has not done so. When faced with this submission, Mr.Pradhan contended that the record is bulky and therefore, it was not possible for the applicant to prepare a paper-book. I am not impressed by this submission. If the applicant had moved the learned Single Judge considering the seriousness of the crime, the learned Single Judge would have definitely allowed the applicant to prepare the paper-book of only essential documents. The learned Single Judge would not have insisted on a bulky paper-book. The record of the case could have been called from the Special Court. Though I find substance in Mr.Govilkar's submission that the applicant has not taken the required steps, the fact remains that by reason of the order passed by this court denying bail to the applicant, the applicant has remained in jail for 4 years and 3 months. He has undergone 3/4th of the sentence imposed on him. It is true that the judgments are not to be treated as statutes. Whether the ratio of a judgment could be attracted to a particular case or not would always depend on the facts and circumstances of that case but the judgments of the Supreme Court certainly serve as guidelines. One cannot expect two criminal cases to have identical

facts. Facts necessarily differ. The principles laid down by the Supreme Court certainly have binding effect if the facts are comparable or similar. It is true that no judgment of the Supreme Court has been pointed out to me which states that if an accused undergoes 3/4th of the sentence imposed on him, he should be released on bail. There can be no such absolute principle. But at the same time, that could be one of the circumstances which may weigh with a court while considering the application for bail preferred by an accused.

8. In Bhagwan's case (supra), the appellants therein were convicted of the offence under section 392 read with section 397 of the I.P.C. and each of them was sentenced to R.I. for 10 years. Their appeal was expedited but the Gujarat High Court could not take it up for final hearing. The appellants, therefore, preferred bail application. The Supreme Court observed that when a convicted person is sentenced to a fixed period of sentence and when he files an appeal under any statutory right, suspension of sentence can be considered by the appellate court liberally unless there are exceptional circumstances and unless there is statutory restriction against suspension of sentence. The Supreme Court further observed that when the sentence is life imprisonment, the

consideration of suspension of sentence could be of a different approach. It was further observed that if for any reason, the sentence of a limited duration cannot be suspended every endeavour should be made to dispose of the appeal on merits more so when a motion for expeditious hearing of the appeal is made in such cases. It was further observed that otherwise the very valuable right of appeal would be an exercise in futility by efflux of time. The Supreme Court further went on to observe that when the appellate court finds that due to practical reasons such appeals cannot be disposed of expeditiously, the appellate court must bestow special concern in the matter of suspending the sentence so as to make the appeal right, meaningful and effective. As the Gujarat High Court was not in a position to hear the appeal expeditiously, the Supreme Court suspended the sentence of the appellants and released them on bail. It is true that in this case, despite the observations of this court, the applicant has not moved the learned Single Judge for expeditious hearing of the appeal. There can be no justification for this conduct of the applicant but it is also true that the record is very heavy and this court in its order dated 29th April, 2002 had also indicated that even the respondents could move for an early hearing. The material sentence of the said order reads as under:-

> "It is for the parties, particularly for the appellant to move the court for early hearing".

The fact remains that the appeal is not heard. In such a situation, in my opinion, the observations of the Supreme Court in Bhagwan's case would be applicable to the present court.

9. In Shailendra's case (supra), the appeal of the applicant before the Supreme Court against his conviction under section 304-B and 498-A of the IPC was pending in the Delhi High Court. He was sentenced to 7 years R.I. under section 304-B and 2 years R.I. under section 498-A. The applicant therein was in custody for more than 3 years. The Supreme Court directed the release of the applicant on bail because he was in custody for more than 3 years and there was no likelihood of the appeal being heard early.

10. But perhaps, the most important circumstance which in my opinion, would entitle the applicant to bail is the fact that the Full Bench of this court has declared MPID Act ultra vires by its judgment and order dated 5th September, 2005. It is pertinent to note that this court has not stayed its judgment and order. On the request made by the learned counsel for the State, Full Bench has only; directed that no action will be taken in pursuance of the judgment for a period of 12 weeks. I am

informed by Shri Borulkar, the learned Public Prosecutor that Special Leave Petition is filed by the State in the Supreme Court. On the last occasion, I had adjourned this application to find out whether the Supreme Court has stayed the judgment of this court. However, it appears that the State has not even moved for stay. In my opinion, because the MPID Act has been declared ultra vires, the very basis of the conviction of the applicant has given way. Even if the appeal is heard now, prima facie, it appears to me that it may not be possible to sustain the conviction of the applicant under the MPID Act. It is pertinent to note that the State of Maharashtra has not chosen to file any reply to the present application though the application is filed as far back as on 7.7.2005. In such circumstances, prayer of Mr.Borulkar that the hearing of this application be deferred, cannot be granted. In my opinion, apart from the fact that the applicant is in custody for 4 years and 3 months and has undergone 3/4th of the sentence awarded to him, the fact that the MPID is declared unconstitutional, is a material change in the circumstances. It is a change of significant nature of which a note will have to be taken by this court. In the circumstances, in my opinion, the applicant will have to be released on bail. Considering the seriousness of the case, stringent conditions will have to be imposed on him.

11. Hence the following order:

The applicant Uday Mohanlal Acharya is ordered to be released on bail in the sum of Rs.1,00,000/- with one or two sureties in the like amount. While on bail, the applicant shall report once a week to the office of Economic Offence Wing of the Mumbai Police situate at Crawford Market, Mumbai. I am informed that passport of the applicant is with the respondent. It shall not be released to the applicant. Mr.Pradhan, the learned counsel for the applicant states that the applicant shall not leave India. His statement is recorded and accepted. Needless to say that if it appears to the respondents that the applicant is indulging in similar activities or has committed breach of the conditions imposed on him, they can approach this court for cancellation of his bail.

Application is disposed of.

At this stage, Mr.Borulkar and Mr.Govilkar state that the operation of this order be stayed. Mr.Pradhan vehemently opposed this prayer. In the circumstances of the case, operation and execution of this order is stayed for a period of six weeks from today.

(SMT.RANJANA DESAI, J.)